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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAN AGUILAR,

Defendant and Appellant.

B209103

(Los Angeles County  
Super. Ct. No. BA235743)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Curtis B. Rappe, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant  
Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General,  
for Plaintiff and Respondent.

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Adan Aguilar appeals from his convictions of three counts of murder (Pen. Code, § 187)<sup>1</sup> and two counts of attempted murder (§§ 187/664). He challenges only the sufficiency of the evidence to support the jury's special circumstance finding that the murder of Eddy Paredes was committed by means of lying in wait. We find sufficient evidence and affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

Since appellant challenges only the evidence to support the lying in wait special circumstance findings as to the murder of Eddy Paredes, we focus on the facts regarding this shooting. The crimes arose out of a dispute between two groups of men at a restaurant in Los Angeles. In the early morning hours of August 25, 2002, appellant and George Magallon went to La Original Adelita restaurant together. Another group of men, Max Gallardo, Eddy Paredes, and their friend Lee, entered and were seated two tables away from appellant and Magallon.

The restaurant was owned and operated by the family of Rudy Vazquez, who was working there that morning. According to Gallardo, appellant started the dispute by approaching their table and yelling at Lee. Gallardo stood and asked Lee if he knew appellant, who had clenched his right fist. Lee indicated he did not know appellant. Gallardo asked appellant if there was a problem. Appellant began cursing at Gallardo and clenched both fists. Magallon ran over to Gallardo's table with his fists clenched and started cursing at Gallardo's group. At this point, appellant appeared to calm down and stopped yelling. Magallon took over as aggressor. Vazquez escorted appellant and Magallon back to their table, then took Magallon outside.

Vazquez walked Magallon outside the restaurant while Magallon continued to curse. Vazquez believed Magallon had been the aggressor. He let appellant stay in the restaurant because he appeared calm. Vazquez left Magallon outside the restaurant and went back in to tend to his customers.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

Gallardo and his friends returned to their conversation. He continued to pay particular attention to appellant, who was sitting at his own table. Magallon quickly returned to the table. Shortly after his return, a piece of burrito was thrown from appellant's direction onto Gallardo's table, hitting first the table, and then Gallardo's chest. The only groups on that side of the restaurant at that time were Gallardo's group and appellant's. Gallardo threw a part of the food back toward appellant's table. Magallon ran towards Gallardo's group with clenched fists. Magallon cursed and asked Gallardo's group to fight. Appellant also walked over to Gallardo's table, taking a position behind Gallardo. Appellant was not saying anything and appeared calm.

After Gallardo stood up, Vazquez and the cook came over. Gallardo sat down, and Vazquez escorted Magallon out. On his way out of the restaurant, Magallon said "Let's bust a cap on these m-----ers." Once again, Vazquez left appellant in the restaurant because appellant had returned to his seat and was acting very calm. Vazquez told Magallon, who was still cursing, that he would not be readmitted to the restaurant.

Gallardo was focused on appellant when appellant returned to his own table. Appellant sat down and calmly started eating his food. After taking a few bites, while Magallon was still outside, appellant stood up, approached Gallardo's table, and extended his hand as if to shake hands with Gallardo. Gallardo testified that he was totally in shock and awe that appellant extended his hand for a handshake. He shook appellant's hand, and appellant said "Don't worry about it. Everything is ok." Gallardo was relieved, feeling good. Appellant smiled very genuinely when he shook Gallardo's hand.

Appellant again returned to his own table, picked up his food and moved to another table with his back to Gallardo's table. At that point, Gallardo said he was not thinking about appellant anymore, believing the confrontation was over. The food arrived at Gallardo's table and Lee went to the bathroom to wash his hands.

At trial, Gallardo was unsure whether Paredes remained seated next to him. Gallardo started eating, and then from the corner of his eye, saw appellant stand up. He thought nothing of it since he had just shaken appellant's hand. Gallardo was eating when he saw appellant pointing the barrel of a gun at his forehead from three feet away.

He saw a muzzle flash before he could stand up. He felt bullets hitting him. Doctors told him he was shot three to five times.

Vazquez was outside with Magallon for two to three minutes the second time. While outside, he heard a loud bang. After a few seconds, he recognized the sound as gunshots. Concerned for the welfare of his sister and nephew who were working in the restaurant, Vazquez ran back inside. He looked for his relatives, and saw appellant run after Paredes from the right side to the left side of the restaurant. Up to that point, he had not seen Paredes arguing with either appellant or Magallon. Appellant had a gun in his hand as he chased Paredes.

As Vazquez ran to rescue his nephew, he saw Paredes kneeling down, facing appellant with his hands crossed, palms facing out in front of his face. Paredes was saying something Vazquez could not hear. Appellant pointed the gun toward Paredes' head and fired at least three times. This occurred in a small alcove near a hallway to the bathrooms. On the third shot, Vazquez grabbed appellant's arm, which was holding the gun, and his neck in an attempt to disarm him. Appellant fought back and the fight moved into the back part of the restaurant. Appellant was firing at Vazquez as they struggled. They fought on top of a table. When the table broke, Vazquez received a gunshot to his clavicle and two grazing shots to the neck. Magallon also was shot.

Paredes and Magallon died of gunshot wounds. Appellant was arrested and charged with their murders (counts one and two) and with the attempted murders of Gallardo and Vazquez (counts three and four).<sup>2</sup> The special circumstance of multiple murders (§ 190.2, subd. (a)(3)) was alleged as to counts one and two. As to the murder of Paredes (count one), it was alleged that the murder was committed by means of lying in wait. (§ 190.2, sub. (a)(15).) As to all five counts, it was alleged that appellant personally discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (b), (c), (d).)

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<sup>2</sup> Appellant was also charged and convicted of the first degree murder of Jamie Castellanos in an unrelated incident.

Appellant was found guilty of the first degree murder of Paredes, the second degree murder of Magallon, premeditated attempted murder of Gallardo, and the non-premeditated attempted murder of Vazquez. The jury found true the special circumstances of multiple murder and lying in wait and the firearm allegations as to each count. The jury set the punishment for the murder of Paredes as life without the possibility of parole.

Appellant was sentenced to a term of life in prison without possibility of parole and a consecutive 25 years to life enhancement for count one, a consecutive term of 40 years to life for count two, a consecutive term of life in prison and a consecutive term of 25 years to life for count three, a consecutive term of nine years and 25 years to life for count four, and a consecutive term of life without possibility of parole plus 25 years to life for count five (the unrelated murder of Castellanos). He filed a timely appeal.

## DISCUSSION

Appellant argues the evidence was insufficient to support the lying in wait special circumstance as to the murder of Paredes. “[T]he lying-in-wait special circumstance requires “an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . .” (*People v. Morales* [(1989)] 48 Cal.3d [527,] 557; *People v. Carpenter* (1997) 15 Cal.4th 312, 388; *People v. Sims* [(1993)] 5 Cal.4th [405,] 432.) Furthermore, the lying-in-wait special circumstance requires “that the killing take place *during the period of concealment and watchful waiting[.]*” ([*People v.*] *Gutierrez* [(2002)] 28 Cal.4th [1083,] 1149.)” (*People v. Cruz* (2008) 44 Cal.4th 636, 679.) Appellant challenges the sufficiency of the evidence as to the first and third elements.

The prosecution’s theory as to lying in wait was that by shaking hands and apologizing before starting to shoot, appellant concealed his purpose from the victims, lulled them into a false sense of security, and subsequently made a surprise attack on

them from a position of advantage. Appellant's arguments as to both elements is based on Gallardo's uncertainty at trial as to whether Paredes was at the table when appellant apologized and shook Gallardo's hand. He contends that because the evidence did not establish that Paredes was aware that appellant shook hands with Gallardo and apologized, there was no evidence of the element of concealment. In addition, he argues that there is no evidence that Paredes was attacked by surprise from a position of advantage because there was testimony that Paredes was in the back of the restaurant attempting to telephone the police immediately prior to the shooting.

“““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.] “““If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203, 253.)

““Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

There was conflicting evidence as to Paredes's location when appellant apologized to Gallardo and shook his hand. Gallardo's trial testimony occurred six years after the shootings. On direct, he testified that appellant came to the table to apologize, before their food arrived. At that point, Lee went to the bathroom to wash his hands. When

asked whether Paredes remained seated next to him, Gallardo said he did not recall, “He could have gotten up at the same time and maybe - - I’m not sure of that.”

On cross-examination, Gallardo was asked if Paredes was at the table when appellant apologized and shook Gallardo’s hand. Gallardo said he was sure Lee was at the table, but was not sure if Paredes was there as well. He said that their food had arrived and they were eating. When asked again whether Paredes was present, Gallardo said, “I don’t recall if he was next to me at that point or if he switched tables to try to get away from the fiasco.” Defense counsel asked whether Gallardo had discussed Paredes’ location with prosecutors. He said he had, and that there was a possibility that another witness said Paredes had moved.

Defense counsel then impeached Gallardo with his testimony from the June 2003 preliminary hearing. Gallardo had been asked who was sitting at the booth with him when he was shot. He answered that Paredes was to his right. On cross-examination, Gallardo confirmed that Paredes was next to him when he was shot. On redirect, Gallardo testified that he remembered telling the prosecutor the same year as the trial that Paredes was sitting next to him when he was shot. He elaborated: “I’m not positive. I am leaning towards that he was sitting next to me but I’m not positive at all.”

The prosecutor asked Gallardo whether Paredes was there when appellant approached and offered to shake hands. Gallardo said, “I don’t know.” But he testified that the only way Paredes could have gotten out of the booth was if he (Gallardo) stood up and let him out. He could not remember if that happened or when it happened.

Crystal Vazquez, Rudy Vazquez’s sister, was working at the restaurant when the shootings occurred. She was asked: “When the defendant walked over to [Gallardo’s] table did you see him extend his hand or do anything before he pulled the gun out?” She answered: “I do recall something like that going on.” She answered that she had seen a gesture by appellant toward Gallardo before appellant pulled the gun out. Crystal described the gesture: “It seemed like he was trying to neutralize the situation, trying to just calm everybody down.” She testified that it was 10 to 15 minutes later that appellant returned to Gallardo’s table and pulled his gun out.

Crystal testified that she talked with Paredes before the shooting started and that he had asked her to call the police. She said Paredes did not return to Gallardo's table, but was instead toward the back of the restaurant talking with Crystal.

On cross-examination, defense counsel asked Crystal whether appellant extended his hand to Gallardo and his party as Vazquez was escorting Magallon out of the restaurant that last time. She answered: "No. I wouldn't say it was at the same time. It was just—it was more—he was trying to neutralize the situation and then that's when Eddy [Paredes] said—sat apart from them and that's when Lee went into the restroom and that's when it happened. That's when—that's what I recall happening." Defense counsel asked who was sitting at Gallardo's table when appellant was trying to neutralize the situation. Crystal responded: "All I remember was his—[Gallardo] and his two friends. I don't remember if they were seated at that table or I don't know if Lee was getting up to go to the restroom." When asked if "they" were in the area of the table, Crystal said: "They were in the area of the table."<sup>3</sup> She did not know whether any member of Gallardo's party shook appellant's hand.

While appellant concedes the evidence that appellant shook hands with Gallardo and apologized "would arguably be sufficient to establish concealment" as to Gallardo, he argues the prosecution failed to establish that Paredes was present when this occurred or that he had knowledge that it occurred. He cites Gallardo's uncertainty about whether Paredes was at the table when this occurred. Appellant relies on Crystal's testimony that Paredes was in the back of the restaurant with her, attempting to call the police. Appellant also cites the testimony of Osvaldo Alanis, who was in the restaurant at the time of the shooting. He testified that he only remembered one person at Gallardo's table when the shooting occurred. Alanis later testified that there could have been more than one person seated at the table.

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<sup>3</sup> Respondent cites the reporter's transcript at pages 1175-1176: "Crystal Vazquez testified that Gallardo's "'two friends,'" presumably Paredes and Lee, 'were in the area of [Gallardo's] table, if not at the table,' when appellant made these remarks [the apology]." This testimony does not appear at the cited pages, but instead appears on page 1205 of the reporter's transcript.

Although Crystal's testimony was somewhat vague and, at times, contradictory, the jury could reasonably rely on her testimony that Gallardo's two friends (presumably Paredes and Lee) were near his table when appellant tried to neutralize the situation. This was sufficient to satisfy the element of concealment for the lying in wait special circumstance. "[A] person may satisfy the requirement by concealing both his purpose and presence, or only his purpose, not his presence, so long as he also watches and waits for a substantial period and then launches a surprise attack from a position of advantage. (See *People v. Stevens* [(2007)] 41 Cal.4th [182,] 203-204.)" (*People v. Bonilla* (2007) 41 Cal.4th 313, 333.)

The same evidence supports the third element, that appellant murdered Paredes in a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Cruz, supra*, 44 Cal.4th at p. 679.) Appellant cites the prosecutor's closing argument, in which he argued that appellant obtained a position of advantage by waiting to start shooting until Gallardo was at the table, Lee was in the bathroom, and Paredes was at the back of the restaurant. Appellant argues that the evidence does not establish that he obtained a position of advantage over Paredes by allowing him to leave the table prior to shooting Gallardo. He contends Paredes had an opportunity to flee or call the police.

We disagree with appellant's characterization of the evidence. Appellant chased Paredes through the restaurant and shot him while Paredes was kneeling on the floor with his arms extended palms out.

Finally, appellant argues there was insufficient evidence that Paredes was shot in a surprise attack on an unsuspecting victim, in light of evidence that Paredes was attempting to call the police when Gallardo was shot, and then ran from appellant. The jury could reasonably conclude from the evidence that while Paredes was sufficiently concerned that he had asked Crystal to call the police, he had witnessed appellant apologizing to Gallardo. The jury could conclude from this that Paredes feared a further attack by Magallon and for that reason sought police intervention.

We are satisfied that there was substantial evidence to support the lying in wait special circumstance.

**DISPOSITION**

The judgment of conviction is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.